

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA,

Plaintiff,

V.

JUDESTIN ALEXANDER ARCASA,

Defendant.

Case No. CR07-5681 FDB

ORDER RE MOTION TO COMPEL
EXAMINATION AND
PRODUCTION OF PERSONNEL
AND EMPLOYMENT FILES OF
TESTIFYING AGENTS AND
GOVERNMENT EMPLOYEES

This matter comes before the Court on Defendant's motion for an order to compel the government to examine the personnel files of all government agents and employees who the government intends to call as witnesses and to disclose to defense counsel any *Brady* or *Giglio* material contained in those records, material that could cast doubt on the credibility of these witnesses, or other impeachment material.

In its response, the Government states that it intends to comply with Defendant's request with respect to the federal officers whom the Government intends to call at trial. The court agrees that the Government need only produce the files of witnesses who it intends to call at trial.

The prosecutor has a duty to disclose all evidence favorable to the defendant which is material either to guilt or to punishment. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The evidence

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1 is material only if there is a reasonable probability, namely, a probability sufficient to undermine
2 confidence in the outcome, that the result would have been different if the government had disclosed
3 the evidence. United States v. Bagley, 473 U.S. 667, 682 (1985). The government has a duty, after
4 a request by the defense, to inspect for *Brady* material the personnel records of federal law
5 enforcement officers who will testify at trial, regardless of whether the defense has made a showing
6 of materiality. United States v. Henthorn, 931 F.2d 29, 31 (9th Cir. 1991). *Henthorn* requirements
7 are met when the staff of the appropriate agency examines the file and notifies the federal prosecutor
8 of potential *Brady* material, after which the federal prosecutor determines whether the material
9 should be produced to the defense or provided to the court for an in camera review. Id. at 1492.
10 Thus, Defendant's motion to compel is granted to the extent that he requests exculpatory evidence
11 contained within the personnel files of federal law enforcement officers whom the Government
12 intends to call at trial.

13 The government contends, however, that it is not obligated to inspect and produce files
14 pertaining to state law enforcement officers the government intends to call as witnesses.

15 Under the Ninth Circuit decision United States v. Dominguez-Villa, 954 F.2d 562 (9th Cir.
16 1992), the government is not obligated to review state law enforcement files not within its possession
17 or control. The prosecution has no obligation to turn over materials not under its control, including
18 personnel files of state law enforcement witnesses. Id., at 566. See also, U.S. v. Colima-Monge,
19 962 F. Supp. 1337 (D. Or. 1997).

20 There is no question, however, that the government's duty to disclose under *Brady* reaches
21 beyond evidence in the prosecutor's actual possession. The Supreme Court has made clear that
22 prosecutors have "a duty to learn of any favorable evidence known to the others acting on the
23 government's behalf in the case, including the police." Kyles v. Whitley, 514 U.S. 419, 437 (1995).
24 In United States v. Risha, 445 F.3d 298 (3rd Cir. 2006), the Third Circuit set out factors used by
25 most circuits to determine whether a state agency's knowledge of *Brady* and *Giglio* information can
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1 be imputed to the federal government. These factors are: (1) whether the party with knowledge of
2 the information is acting on the government's behalf or is under its control; (2) the extent to which
3 the party with knowledge and the federal government are part of a team, are participating in a joint
4 investigation, or are sharing resources; and (3) whether the entity charged with constructive
5 possession has ready access to the evidence. Id., at 304.

6 Here, there is no allegation, or evidence, that the police officers were under the federal
7 government's control or acting on its behalf. Nor has there been any suggestion that the local police
8 officers were part of a team or engaged in a joint effort with federal agents. Lastly, there is nothing
9 in the record as to whether any possible *Brady* or *Giglio* information is readily available to the
10 government. Under these considerations, the Court finds it inappropriate to compel examination of
11 local police officer personnel and employment records. Nonetheless, if such information comes into
12 the possession or control of the government, such *Brady* and *Giglio* material must be disclosed to
13 the defense.

14 ACCORDINGLY;

15 IT IS ORDERED:

16 Defendant's motion to compel examination and production of personnel and employment
17 files of testifying agents and government employees [Dkt # 26] is **DENIED** to the extent the
18 Defendant seeks to compel examination of the personnel and employment records of local law
19 enforcement personnel.

20 DATED this 3rd day of March, 2008.

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23 FRANKLIN D. BURGESS
24 UNITED STATES DISTRICT JUDGE

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